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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 122

MARTIN A. JORDAN and VIOLET E. JORDAN, his wife, and JAMES F. McMICKEN and DOROTHY McMICKEN, his wife, *Appellants,*

v.

VILLAGE OF MENOMONEE FALLS, *Appellee.*

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

This jurisdictional statement by Appellants is filed pursuant to Rules 13(2) and 15.

OPINIONS BELOW

Copies of the two unreported opinions of the trial court, the Circuit Court of Waukesha County, are appended.

The majority and dissenting opinions of the Supreme Court of the State of Wisconsin are reported begin-

ning at 28 Wis. (2) 608, 137 N.W. (2) 442. Copies of those opinions and the judgment appealed from are appended.

GROUNDS OF JURISDICTION

This action was brought by Appellants as plaintiffs against Appellee as defendant in the Circuit Court of Waukesha County, Wisconsin, to recover Five Thousand Dollars required to be paid to the Appellee as a prerequisite for approval of Appellants' plat of the subdivision of their land within the Village of Menomonee Falls. The Circuit Court granted judgment in favor of Appellants. On appeal to the Supreme Court of the State of Wisconsin, that court reversed the judgment of the Circuit Court and remanded the cause with directions to dismiss the complaint. The judgment of the Supreme Court of the State of Wisconsin was entered November 2, 1965. Motion for rehearing was made within the required time. The Supreme Court of Wisconsin denied the motion for rehearing on January 4, 1966. Notice of appeal was filed with the Clerk of the Wisconsin Supreme Court on March 18, 1966, that court being possessed of the record on that date.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U.S.C. Sec. 1257(2). In this case the validity of an ordinance of the Village of Menomonee Falls, enacted pursuant to authority granted by a statute of the State of Wisconsin, is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Wisconsin is in favor of its validity. *Poulos* v. *New Hampshire,* 345 U.S. 395, sustains the Court's jurisdiction of this appeal.

STATUTE AND ORDINANCE INVOLVED

State of Wisconsin General Platting Law, Chapter 236, Wert's, Wisc. Stats. Ann., Vol. 27, p. 457 ff. This chapter requires generally that whenever a division of land creates a subdivision, defined as five or more parcels or building sites of 1½ acres each or less in area created either by one act of division or by successive divisions within a period of five years, the subdivision plat must be approved by the governing body of the municipality. Section 236.45, id. at p. 532, provides as follows:

> Local Subdivision regulation. (1) Declaration of legislative intent. The purpose of this section is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.
>
> (2) Delegation of power. (a) To accomplish the purposes listed in sub. (1), any municipality,

> town or county which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter. . .

Pursuant to the foregoing statutory authority, the *Village of Menomonee Falls* enacted Ordinance 18-1 entitled, *"An Ordinance Regulating the Division and Platting of Land,"* adopted March 2, 1959. Its pertinent provisions are as follows:

> In order that adequate open spaces and sites for public uses may be properly located and preserved as the community develops; and in order that the cost of providing the public school, park and recreation sites and facilities necessary to serve the additional families brought into the community by subdivision development may be most equitably apportioned on the basis of the additional need created by the individual subdivision development, the following provisions are established:
>
> 8.01 Reservation of Potential Sites.
>
> (1) In the design of the plat, consideration shall be given to the adequate provision of and correlation with such public sites or open areas.
>
> (2) Where it is determined by the plan commission that a portion of the plat is required for such public sites or open spaces, the subdivider may be required to reserve such area for a period not to exceed three years, after which the Village shall either acquire the property or release the reservation.
>
> 8.02. Dedication of Sites.
>
> (1) Within the corporate limits of the Village, where feasible and compatible with the comprehensive plan for development of the community, the subdivider shall provide and dedicate to the public

adequate land to provide for the school, park, and recreation needs of the subdivision.

(2) The amount of land to be provided shall be determined on the basis of an amount equal in value to $200.00 per residential lot created by the subdivision. Such value shall be determined by the Village assessor on the basis of full and fair market value of the land. If the owner is not satisfied with such appraisal, he may appeal such determination, in which case an appraisal board consisting of one appraiser selected by the Village at its own expense, one selected by the property owner at his own expense and a third selected by the two other appraisers at Village expense, shall determine the value.

8.03. Proportionate Payment in Lieu of Dedication.

(1) Where such dedication is not feasible or compatible with the comprehensive plan, the subdivider shall in lieu thereof pay to the Village a fee equivalent to the value of the required dedication. Such fee shall be distributed as follows:

A. $120.00 per residential lot created by the subdivision to be held in a non-lapsing fund for the benefit of the school district or districts in which the plat lies, on the basis of proper apportionment between districts where the plat is in more than one district, and to be made available to the appropriate district or districts upon their request.

B. $80.00 per residential lot created by the subdivision to be placed in a non-lapsing fund to be used for park and recreation area development.

(2) Such fees shall be used exclusively for immediate or future site acquisition or capital improvement. . .

8.05. Determination of Feasibility.

The determination as to the feasibility of dedication shall be made by the Village Plan Commission. The subdivider shall however have the option of choosing to make payment in lieu of dedication.

FEDERAL QUESTIONS PRESENTED

The ordinance of the Village of Menomonee Falls requires a landowner, as a condition of securing required Village approval of the subdivision of his land, to dedicate to the Village land for schools, parks and recreational purposes equal in value to $200 for each residential lot created by the subdivision, or, in the alternative, to pay to the Village $200 for each such residential lot, if dedication of land is not feasible, or if the landowner so chooses. Does this ordinance requirement of land dedication or payment of money in lieu thereof violate the Fourteenth Amendment to the Constitution in that:

1. It takes private property of the landowner for public use without just compensation? or
2. It denies to the landowner the equal protection of the laws?

STATEMENT OF THE CASE

The ordinance of the Village of Menomonee Falls, challenged here, requires a landowner, as a condition of securing required Village approval of the subdivision of his land, to dedicate to the Village land "to provide for the school, park and recreation needs of the subdivision" equal in value to $200 for each residential lot. The ordinance makes no requirement that school, park, or recreational facilities for the subdivi-

sion shall be located on the dedicated subdivision land; nor does it require that such facilities, when provided, shall be for the primary use of the residents of such subdivision. Where dedication of land is not feasible, or not compatible with the Village's comprehensive zoning plan, or at the option of the landowner, the ordinance requires payment of $200 per residential lot "in lieu" of land dedication. According to the ordinance, $120 of each such $200 payment in lieu of land dedication is "held" in a non-lapsing fund for the benefit of the school district in which the subdivision lies and is "to be made available to the appropriate district upon . . . request." The balance of $80 is "placed" in a non-lapsing fund "to be used for park and recreation area development" without limitation to location in the subdivision or primary use by its residents.

Appellants submitted a plat of a proposed subdivision called Menomonee Hills Subdivision. It provided for the division of less than 8 acres into 25 residential lots. To secure approval, Appellants paid $5,000 in lieu of land dedication. The payment was made under protest; and the Appellants began this proceeding by suing for its recovery. R. 170, 172.[1]

Appellants' complaint challenged the ordinance's provisions for land dedication or payments in lieu thereof on federal as well as state grounds. The federal grounds asserted were violation of the Fifth and Fourteenth Amendments; and specifically the denial to Appellants of the equal protection of the laws, and the confiscation of their property without due process of law. The pertinent allegations of the complaint,

[1] "R." references are to the pagination of the record as certified to this Court.

paragraphs 7(a), and 7(e)(1)(2)(3), R. 151-152, are quoted in the margin.[2] By its specific denials, Appellee put in issue Appellants' contentions of the violation of the Fifth and Fourteenth Amendments. The pertinent denials in Appellee's amended answer, paragraphs 3(a), 3(e)(1)(2)(3), R. 161-162, are quoted in the margin.[3]

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[2] "7. That said Section 8 of said ordinance was invalid and void as violative,

"(a) of Articles V and XIV of the Amendments to the United States Constitution; . . ."

"(e) of other statutes and laws in such case made and provided, in, among others, the following respects:

"(1) in that said section denies to plaintiffs the equal protection of the laws, and discriminates against them in respect to the collection of general and school taxes and applies the applicable laws differently to different persons under the same or similar circumstances, with particular regard to the method of shifting the costs of open spaces and public sites, and public school, park and recreation sites and facilities from the public generally to the plaintiffs and other future subdividers, and not in a uniform or impartial manner as between subdividers;

"(2) in that said section deprives plaintiffs of and confiscates their property without due process of law and with no significant reciprocity or benefit;

"(3) in that said section takes the property of plaintiffs for public use without just compensation therefor, contrary to Chapter 32; . . ."

[3] "3. And for answer to Paragraph 7 of plaintiffs' complaint, the defendant denies that Section 8 of said Ordinance 18-1 was invalid and void for any reason, and particularly denies that it violated:

"(a) Articles V and XIV of the Amendments to the United States Constitution, or any other provision thereof; . . ."

"(e) or any other statutes and laws in such case made and provided, in any, but particularly the following respects:

"(1) Denies that said Section denies plaintiffs the equal protection of the laws, or discriminates against them in respect to the collection of general and school taxes, or applies the applicable laws

The trial developed the following facts. The Village Board's "only motive in drafting this Ordinance was to preserve the tax base." Tax laws "must be changed, but until such time the Village is faced with a practical problem, and is trying to meet it fairly." The "prime" objective of the ordinance is "to protect citizens from tax burdens not only for the present but in future years." The $200 fee per residential lot is "a source of income in addition to taxes." Such are the official statements of the representatives of the Village Board in explaining the purpose of the ordinance. R. 138; 137; 136.

The fees in lieu of land dedication are not used in the subdivision from which they are collected; and it is up to the school district and the Village Board to decide the location of schools and parks. R. 137. The Village's comprehensive zoning plan shows existing schools but makes no provision for new school sites. The nearest school to Appellants' Menomonee Hills Subdivision is the Shady Lane School located outside the subdivision. No consideration has been given to a park for serving the Menomonee Hills Subdivision, other than a proposed park site located in another subdivision. R. 122-123; 225.

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differently to different persons under the same or similar circumstances, with regard to shifting the costs of the open spaces and the public sites and facilities mentioned in the complaint, from the general public to plaintiffs and other future subdividers without uniformity or impartiality between subdividers, or in any other illegal manner or way;

"(2) Denies that said Section in any way deprives plaintiffs of or confiscates their property without due process of law, or with no benefit to the plaintiffs;

"(3) Denies that said Section takes plaintiffs' property without just compensation therefor, contrary to any law, and particularly said Chapter 32; . . ."

The moneys received in lieu of land dedication are turned over, in the proportions specified by the ordinance, to the appropriate school district for its use as to schools, and to the Village Treasury for its uses as to parks and recreation. The disbursements made from such funds by the school district and the Village are not segregated from disbursements of funds obtained from general sources. R. 146-147.

The Menomonee Hills Subdivision is located in Joint School District No. 1. That School District covers 65 per cent of the whole land area of the Village. R. 145.[4]

The trial court did not pass upon the federal questions raised by complaint and answer, since it found the ordinance to be beyond the Village's powers under state law. App. 6a.[5] However, in that connection, the trial court concluded on the evidence before it (R. 172):

> That Section 8 of the Subdivision Control Ordinance of the defendant Village insofar as it requires the subdivider to pay to the Village the sum of $200.00 per lot is in the nature of a tax, and was intended to be and was a source of income in addition to taxes to the Village; that it was not a charge made incidental to regulation under the police power but a contribution toward the cost of maintaining governmental functions, acquisition of parks for general public use and acquisition or construction of schools for education of children constituting members of the general public, and, as such, a tax for which Chapter 236 makes no provision.

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[4] One out of five children in Joint School District No. 1 goes to parochial schools in the District. R. 119.

[5] "App." references are to the Appendix which follows in this Jurisdictional Statement.

On appeal, a majority of the Wisconsin Supreme Court found state authorization for the ordinance's requirements of land dedications or payment in lieu thereof. App. 16a, 21a. Thus faced with the question of the ordinance's validity under the federal Constitution, the majority held it to be constitutional "as a reasonable exercise of the police power." App. 20a. The majority "deemed" from the evidence that the Village will be required to provide more land for schools, parks and playgrounds as a result of the activities of subdividers. So it deemed the general public use of land dedications to be immaterial. App. 18a. The premise of its opinion appears to be that subdivisions cause influx of population, and not that influx of population makes new subdivisions necessary. App. 18a. In these terms, the majority specifically discussed and rejected Appellants' contention that the ordinance takes private property for a public use without payment of just compensation. App. 16a ff. A decision of the Supreme Court of Montana[6] was cited in support of the majority holding; but "well-considered" decisions of the highest courts of Illinois and Kansas[7] were recognized as *contra,* and rejected. App. 22a. The minority opinion of Hallows, J., dissents from the majority on both state and federal grounds. App. 23a ff.

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[6] *Billings Properties, Inc.* v. *Yellowstone County,* 144 Mont. 25, 394 P. (2) 182.

[7] *Rosen* v. *Village of Downers Grove,* 19 Ill. (2) 448, 167 N.E. (2) 230; and *Coronado Development Co.* v. *City of McPherson,* 189 Kan. 174, 368 P. (2) 51.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. *The taking of private property for public use without payment of just compensation.*—The substantial nature of this federal question is sufficiently shown by the relevant authorities. On facts not significantly different from this case, Illinois, New York, and Colorado hold municipal requirements for land dedications or payments in lieu thereof to constitute the unconstitutional taking of private property for public use without compensation. *Pioneer Trust & S. Bank* v. *Village of Mount Prospect,* 22 Ill. (2) 375, 176 N.E. (2) 799 (required dedication of one acre per sixty residential sites and one-tenth of an acre per each acre of business industrial sites to provide public grounds such as schools, parks, etc.); *Gulest Associates, Inc.* v. *Town of Newburgh,* 25 Misc. (2) 1004, 209 N.Y.S. (2) 729, aff'd. 15 App. Div.(2) 815, 225 N.Y.S.(2) 538 (Second Dept.) (required payment of $50.00 per residential lot in lieu of dedication of ten per cent of whole subdivision to provide neighborhood parks and for recreational purposes); *Jenad, Inc.* v. *Village of Scarsdale,* 23 App. Div.(2) 784, 258 N.Y.S.(2) 777 (Second Dept.), appeal pending in Court of Appeals (required payment of $250.00 per residential lot in lieu of land dedication for parks, playgrounds and recreational purposes); *City and County of Denver* v. *Denver Buick, Inc.,* 141 Col. 121, 347 P.(2) 919 (required dedication of off-street parking facilities as condition of use of land for business purposes). Pennsylvania and New York go even further in holding required *reservations* of land (for the municipality's future acquisition by condemnation and payment) to be unconstitutional takings of private property for a public purpose without compen-

sation—at least in the absence of compulsory acquisition by the municipality or provision for compensation of improvements made during the reservation period. *Miller* v. *City of Beaver Falls,* 368 Pa. 189, 82 A.(2) 34; *Forster* v. *Scott,* 136 N.Y. 579, 32 N.E. 976. Our position is further supported by decisions in Michigan, Kansas, Oregon, Illinois, New Jersey, and California. The cases in those states, contrary to the decision of the Wisconsin Supreme Court here, hold municipal requirements for land dedications or payments in lieu thereof to be beyond the "regulation" authorized by state statute because such requirements are takings or revenue measures for general public purposes.[8]

The Wisconsin Supreme Court relied on *Billings Properties, Inc.* v. *Yellowstone County,* 144 Mont. 25, 394 P.(2) 182. That decision upheld the validity of a municipal requirement of land dedication for parks and playgrounds against attack as an unconstitutional taking of property without compensation. But there, unlike here, utilization of the dedicated land was restricted to use in the subdivision which dedicated it.

This Court has not passed upon the constitutional validity of municipal requirements for land dedication

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[8] *Gordon* v. *Village of Wayne,* 370 Mich. 329, 121 N.W. (2) 823 (1963); *Ridgemont Development Co.* v. *City of East Detroit,* 358 Mich. 387, 100 N.W. (2) 301 (1960); *Merrelli* v. *City of St. Clair Shores,* 355 Mich. 575, 96 N.W. (2) 144 (1959); *Coronado Development Co.* v. *City of McPherson,* 189 Kan. 174, 368 P. (2) 51 (1962); *Haugen* v. *Gleason,* 226 Ore. 99, 359 P. (2) 108 (1961); *Rosen* v. *Village of Downers Grove,* 19 Ill. (2) 448, 167 N.E. (2) 230 (1960); *Daniels* v. *Point Pleasant,* 23 N.J. 357, 129 A. (2) 265 (1957); *Kelber* v. *City of Upland,* 155 Cal. App. (2) 631, 318 Pac. (2) 561 (D.C.A. 4th Dist., 1958).

or payments in lieu thereof.[9] However, our position is supported by the decisions and reasoning in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (State statute prohibiting the mining of subsurface coal so as to cause surface subsidence held invalid as a taking of reserved coal rights) and *Buchanan* v. *Warley,* 245 U.S. 60 (City ordinance prohibiting sale of a house to a negro where the majority of residents on the block are white held invalid as a taking of a white seller's property rights).

The decision of the Wisconsin Supreme Court in its departure from precedents creates a division of state authorities on the point, requiring the decision of this Court in settlement of the question.

B. *Denial of equal protection.*—The payment in lieu of land dedication exacted of Appellants for a subdivision of 25 residential lots is for the general public benefit of the Village; for its use is not limited primarily to residents of the Menomonee Hills Subdivision. Yet no payment is exacted of others who, like Appellants, provide homes in response to the demands of the increased population which add to the school, park, and recreation needs of the Village—the land developers now selling residential lots on land subdivided before passage of the ordinance; the landowners

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[9] In *Beman* v. *Parker,* 348 U.S. 26, which upheld the validity of the District of Columbia Redevelopment Act, there was an admitted taking of property with compensation paid. The question decided was whether the taking was for a private, as distinguished from a public use. The payment of just compensation was not involved. *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, upheld the validity under the police power of a zoning ordinance which regulated the use of, but did not take, plaintiff's land. Neither case was concerned with required land dedications or payments in lieu thereof. In neither case was there both a taking and a failure to pay compensation.

erecting houses for rent on land not subdivided; and the landowners building apartment houses for multiple families on land not subdivided. Increased population demands business, shopping, and industrial facilities as well as homes; but the ordinance requires land dedications or payments only from the subdividers of residential lots. In its broader aspects, so far as the exacted payment is passed on to the purchasers of homes in the subdivision, the ordinance was intended to (see p. 9, *supra*) and does discriminate against newcomers to the village in favor of old residents. The increased costs of Village school, park, and recreational needs is caused by the requirements of an increased population. The increased population necessarily consists of both old and new residents. Yet a special burden of such increased costs is placed upon the newcomers, and then only upon such newcomers as buy lots in new subdivisions. In an expanding community like the Village here, such newcomers will pay all or part of the exacted payments through the increased prices of subdivision homes they purchase. But the need which the Village seeks to meet here is a public need which should be borne by all members of the Village public, old and new members alike. The Village's meeting of such need by special burdens imposed on some but not all of the general public presents a substantial question of denial of equal protection. *Gulest Assoicates, Inc.* v. *Town of Newburgh*, 25 Misc.(2) 1004, 209 N.Y.S.(2) 729, aff'd. 15 App. Div.(2) 815, 225 N.Y.S.(2) 538 (Second Department); *Jenad, Inc.* v. *Village of Scarsdale*, 23 App. Div. (2) 784, 258 N.Y.S.(2) 777 (Second Department) appeal pending in Court of Appeals. The *Newburgh and Scarsdale* cases both hold the exaction of a payment in lieu of land dedication to be invalid as a denial of equal protection.

NATIONAL IMPORTANCE OF THE QUESTIONS PRESENTED

We doubt not our right of appeal in this case. If we be mistaken in that, the national importance of the questions presented would warrant the granting of certiorari. Between 1950 and 1960, the increase in the population of metropolitan centers in the United States accounted for 97 per cent of the nation's total population increase. "Radial expansion" in the enlargement of metropolitan areas draws the latest newcomers into the inner, older and less desirable city residential areas while people with relatively longer residence move outward to the suburbs. Between 1940 and 1950, for example, metropolitan suburban rings grew 2½ times as fast as their central cities.[10] It is this movement of population and not subdividers' activities which creates the need for increased municipal facilities.

The problem of providing schools, parks, and recreational areas, and indeed the over-all problem of providing all municipal services, is brought to the forefront by such expansion. The Village of Menomonee Falls, a suburb of Milwaukee, shares these problems with other suburbs throughout the country.

The basic question here is not whether the Village has the power to, and should provide good municipal facilities, but how the costs of such provision shall be equitably and constitutionally apportioned. As the recent state cases cited in this statement show, some municipalities throughout the country have attempted

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[10] *"On the Impact of Population and Community Changes on Local Government,"* by Philip M. Hauser, Professor and Chairman of the Department of Sociology, University of Chicago, published by Institute of Local Government, Graduate School of Public and International Affairs, University of Pittsburgh (1961), pp. 5 to 8, inclusive.

to adopt Appellee's approach of requiring land dedications or payments in lieu thereof. The decision of the Wisconsin Supreme Court, if left standing, will surely encourage the trend. Yet, at least as we view it with almost unanimous judicial support, a taking of private property for public use is not exempted from the Constitution's requirements of just compensation and equal protection of the laws because the police power is exercised by a municipality to achieve a commendable public objective. Whether we are right or wrong, the authoritative decision of the Court is needed for the guidance of all concerned—municipalities, landowners, builders, financial institutions, and others directly connected with the providing of homes for our ever-increasing urban and suburban population.

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APPENDIX

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APPENDIX

Trial Court's First Decision Dated September 28, 1964

(Title Omitted)

The plaintiffs purchased property in the Village of Menomonee Falls intending to plat, develop, and subdivide it for residential purposes. On August 15, 1960 the plat was approved by the Village Board, and on September 12, 1960 the plaintiffs paid to the defendant the sum of $5,000.00 pursuant to Section 8.02 of Ordinance #18. The $5,000.00 was paid by check upon which was inscribed "School tax for Jordan-McMicken Menomonee Hills subdivision in lieu of land dedication paid under protest." The plaintiffs thereupon proceeded to fully develop the lots and thereafter did sell them to Horizon Homes, Inc. On October 26, 1962 the plaintiffs made a written demand on the defendant for a return of the said $5,000.00. The defendant refused payment, and the action was commenced by the service of a Summons on the 12th day of March, 1963. It is the plaintiffs' position that the ordinance in question was invalid and void for various reasons.

Villages are creations of the Legislature, and can exercise only the powers specifically conferred upon them. Chapter 236 of the Statutes relating to platting of lands is controlling, excepting as expressly therein extending authority and powers to municipalities, including Villages. The only applicable statute is Section 236.45 which so far as here material provides:

> "236.45 Local subdivision regulation. (1) Declaration of Legislative Intent. The purpose of this section is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from

fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.

(2) Delegation of Power. (a) To accomplish the purposes listed in sub. (1), any municipality, town or county which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter. Such ordinances may include provisions regulating divisions of land into parcels larger than 1½ acres or divisions of land into less than 5 parcels, and may prohibit the division of land in areas where such prohibition will carry out the purposes of this section. Such ordinances may make applicable to such divisions any of the provisions of this chapter, or may provide other surveying, monumenting, mapping and approving requirements for such division. * * *".

The ordinance of the Village relating to subdivision control, which could only have been passed under the above section, so far as here material, provides:

"Section 8. Public sites and open spaces.

In order that adequate open spaces and sites for public uses may be properly located and preserved

as the community develops; and in order that the cost of providing the public school, park, and recreation sites and facilities necessary to serve the additional families brought into the community by subdivision development may be most equitably apportioned on the basis of the additional need created by the individual subdivision development, the following provisions are established: * * *

1—8.02. Dedication of Sites.

(1) Within the corporate limits of the village, where feasible and compatible with the comprehensive plan for development of the community, the subdivider shall provide and dedicate to the public adequate land to provide for the school, park and recreation needs of the subdivision.

(2) The amount of land to be provided shall be determined on the basis of an amount equal in value to $200.00 per residential lot created by the subdivision. Such value shall be determined by the Village assessor on the basis of full and fair market value of the land. If the owner is not satisfied with such appraisal, he may appeal such determination, in which case an appraisal board consisting of one appraisor selected by the Village at its own expense, one selected by the property owner at his own expense and a third selected by the two other appraisers at Village expense, shall determine the value.

1—8.03. Proportionate Payment in Lieu of Dedication.

(1) Where such dedication is not feasible or compatible with the comprehensive plan, the subdivider shall in lieu thereof pay to the Village

a fee equivalent to the value of the required dedication. Such fee shall be distributed as follows:

A. $120.00 per residential lot created by the subdivision to be held in a non-lapsing fund for the benefit of the school district or districts in which the plat lies, on the basis of proper apportionment between districts where the plat is in more than one district, and to be made available to the appropriate district or districts upon their request.

B. $80.00 per residential lot created by the subdivision to be placed in a non-lapsing fund to be used for park and recreation area development.

(2) Such fees shall be used exclusively for immediate or future site acquisition or capital improvement."

Coronado Development Company v. City of McPherson, 368 Pac. 2d, page 51, seems squarely in point. In that case the City of McPherson, Kansas, adopted regulations governing the platting and subdivision of lands within its jurisdiction. The ordinance in question provided, among other things, that:

"The entire sum of money equal to the appraised value of land comprising an area equivalent to 10% of the total area of the tract shall be paid by the owner or subdivider to the City of McPherson in the event that there are not public open spaces required by the planning commission and the governing body. Sums of money so received by the City of McPherson shall be placed in a special fund to be known as The Public Land Purchase & Improvement Fund and allocated by the governing body solely

> for the purchase of land for public parks or playgrounds and other public areas."

The governing body of the City refused to approve the plat unless the 10% appraised value of the entire area amounting to $993.75 was paid. The development company then paid the amount in question, proceeded with their development, and then filed its petition for a declaratory judgment claiming the regulation was invalid. The Kansas Court then deemed it necessary to examine the State Statutes to determine if authority existed for the enactment of the regulation in dispute. The Kansas Statute was very similar to Section 236.45, and in part stated as follows:

> "Such regulations may provide for the proper area of streets in relation to other existing or planned streets and to the mapped plan for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots."

The Kansas Court then stated that the enabling statute specifically granted to municipalities authority to make regulations for convenient open spaces for parks and playgrounds, but that the enabling statute went no further. It was held that the Kansas statute quoted above is not authority for a regulation requiring the developer to pay 10% of the appraised value to the City. The fact that the payment is to be placed in a special fund solely for the purchase of land for public parks or playgrounds does not add to the City's authority under the statute. The Court then held that the City Ordinance was beyond the scope of the enabling statute.

This it seems is the exact situation with the Menomonee Falls ordinance. A careful perusal of Chapter 236 controlling the platting of lands and the recording and vacat-

ing of plats reveals nowhere authorization providing for any payment of money as a special school dedication tax or park dedication tax. It was obviously not the intention of the Legislature to require contributions to the municipality or school district for the acquisition of parks for general public use, or acquisition or construction of schools for education of children constituting members of the general public. In the instant case it is obvious that the Village Ordinance was intended to and did provide an additional avenue of revenue in the nature of a tax for immediate or future site acquisition or capital improvement for school and park needs of the community generally. This is clearly shown by the Minutes of the Village Board Special Meeting on December 22, 1958 in which "Planner Nelson" stated that the $200.00 fee was a source of income in addition to taxes. The payment required from the subdivider is not a charge made incidental to regulation under the police power, but is a contribution toward the cost of maintaining a governmental function. This is clearly a tax. 41 Am. Jur. 46 states as follows:

> "§ 12. Fees. The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax."

Chapter 236 makes no provision for taxation or invasion of the taxing powers. The Village in effect uses Chapter 236 as a means of collecting a tax. Nowhere is such power granted to the Village under that Chapter.

The Village exceeded its authority under the ordinance by requiring a cash deposit in lieu of dedication of land. This section is thereby declared null and void. Section 236.45 of the Wisconsin Statutes cannot be construed to

abrogate or supersede the zoning or condemnation provisions of the statutes and the constitution.

The Village argues that the plaintiffs have failed to exhaust the administrative remedy provided by law, and cannot now raise the question in a collateral proceeding, and that the plaintiffs in waiting more than two years are guilty of laches. $5,000.00 was paid by the plaintiffs to the defendant involuntarily and under protest, and under compulsion in the sense that they were paid in order that they might obtain the necessary approval of the subdivision plat. The exact procedure used here was followed in Kelber v. The City of Upland, 318 Pac. 2d 561.

It is fundamental that laches will not bar a suit to enjoin a void assessment. Certainly then it must be true that laches will not bar a suit to recover payments made under a void ordinance.

Judgment may be entered in favor of the plaintiffs against the defendant in the amount of $5,000.00, together with interest and costs.

Dated this 28th day of September, 1964, at Waukesha, Wisconsin.

By the Court:
WILLIAM E. GRAMLING
Circuit Judge

Trial Court's Second Decision Dated February 9, 1965

(Title Omitted)

Under date of September 28, 1964, the Court filed its opinion in this matter. Thereafter counsel for the defendant, in November of 1964, asked the Court to set aside its decision and hear oral arguments of the parties. The Court granted this motion. Thereafter oral arguments were heard and supplemental briefs were filed. The Court has examined those briefs and weighed the

arguments of counsel. The Court sees no reason to change its original decision. In that decision the Court said: "Villages are creations of the Legislature, and can exercise only the powers specifically conferred upon them." Nowhere, including the home rule statute, can the Court find any delegation of authority giving a Village the power to do what Menomonee Falls here wishes to do.

The defendant then vigorously argues that the plaintiffs are guilty of laches. The Court, in its original decision, said: "It is fundamental that laches will not bar a suit to enjoin a void assessment. Certainly then it must be true that laches will not bar a suit to recover payments made under a void ordinance." McQuillin on Municipal Corporations, Section 38.191, says this: "Nor does laches constitute a defense in such situations." 'Such situations' refers to the situation where an assessment is levied without legal authority.

The defendant then argues that if the collection was a tax, the procedural requirements of a taxpayer to recover payment of such tax were not followed. The amount paid by the plaintiffs herein was not in fact a tax, but was in the nature of a tax. The statutes require Villages to follow certain procedures in connection with the imposition of taxes. These requirements the Village has not fulfilled. Therefore Section 74.73 does not apply.

Judgment may be entered in accordance with the original decision of the Court. The Court has today signed the Findings of Fact and Conclusions of Law as previously submitted by the attorney for the plaintiffs.

Dated this 9th day of February, 1965, at Waukesha, Wisconsin.

By the Court:
WILLIAM E. GRAMLING
Circuit Judge

Majority Opinion of Supreme Court of Wisconsin

(Title Omitted)

APPEAL from a judgment of the circuit court for Waukesha county: WILLIAM E. GRAMLING, Circuit Judge. *Reversed.*

Action by plaintiffs Martin A. Jordan and James F. McMicken and their wives against defendant village to recover $5,000 paid by plaintiffs as an equalization fee in lieu of dedicating land as required by defendant's ordinance governing the subdivision of lands within the village.

In October, 1959, Jordan and McMicken (hereinafter "plaintiffs") commenced negotiations for the purchase of a 7.85 acre tract of land in defendant village for the purpose of subdividing it into lots and selling the lots. While negotiating, plaintiffs became aware that defendant had enacted an ordinance in March, 1959, which required subdividers to either dedicate a portion of their land or pay a fee in lieu thereof. Pertinent sections of the ordinance are:

> "In order that adequate open spaces and sites for public uses may be properly located and preserved as the community develops; and in order that the cost of providing the public school, park, and recreation sites and facilities necessary to serve the additional families brought into the community by subdivision development may be most equitably apportioned on the basis of the additional need created by the individual subdivision development, the following provisions are established:
>
> "8.01. Reservation of Potential Sites.
>
> "(1) In the design of the plat, consideration shall be given to the adequate provision of and correlation with such public sites or open areas.

"(2) Where it is determined by the plan commission that a portion of the plat is required for such public sites or open spaces, the subdivider may be required to reserve such area for a period not to exceed three years, after which the Village shall either acquire the property or release the reservation.

"8.02. Dedication of Sites.

"(1) Within the corporate limits of the Village, where feasible and compatible with the comprehensive plan for development of the community, the subdivider shall provide and dedicate to the public adequate land to provide for the school, park and recreation needs of the subdivision.

"(2) The amount of land to be provided shall be determined on the basis of an amount equal in value to $200.00 per residential lot created by the subdivision. Such value shall be determined by the Village assessor on the basis of full and fair market value of the land. If the owner is not satisfied with such appraisal, he may appeal such determination, in which case an appraisal board consisting of one appraisor selected by the Village at its own expense, one selected by the property owner at his own expense and a third selected by the two other appraisers at Village expense, shall determine the value.

"8.03. Proportionate Payment in Lieu of Dedication.

"(1) Where such dedication is not feasible or compatible with the comprehensive plan, the subdivider shall in lieu thereof pay to the Village a fee equivalent to the value of the required dedication. Such fee shall be distributed as follows:

"A. $120.00 per residential lot created by the subdivision to be held in a non-lapsing fund for the beneft of the school district or districts in which the plat lies, on the basis of proper apportionment between

districts where the plat is in more than one district, and to be made available to the appropriate district or districts upon their request.

"B. $80.00 per residential lot created by the subdivision to be placed in a non-lapsing fund to be used for park and recreation area development.

"(2) Such fees shall be used exclusively for immediate or future site acquisition or capital improvement . . . .

"8.05. Determination of Feasibility.

"The determination as to the feasibility of dedication shall be made by the Village Plan Commission. The subdivider shall however have the option of choosing to make payment in lieu of dedication."

With full knowledge of the ordinance, plaintiffs purchased the property for $22,000. Plaintiff Jordan did once voice an informal objection to Gottlieb, village commissioner, stating that he thought the ordinance was unconstitutional. Because of the small area and the particular layout of the subdivision planned, it did not occur to plaintiffs to dedicate any land for school or park sites. They proceeded on the assumption that they would pay the $5,000 equalization fee in lieu of land dedication, which fee they paid by check September 12, 1960, and typed "paid under protest" on the check. Plaintiffs then proceeded to complete the subdivision at a total cost of $73,896.98, including the $5,000 platting fee. All 25 lots were sold between September, 1961, and April, 1963, for a total sum of $100,000.

On October 26, 1962, plaintiffs served on defendant a formal demand and claim for return of the payment, which was denied by defendant.

Plaintiffs alleged that the payment was a tax which the village could not levy because (1) it did not have authori-

zation from the legislature and (2) it was an unconstitutional taking of property without just compensation. Trial was to the court and judgment was entered February 12, 1965, for plaintiffs, requiring defendant to repay to plaintiffs the $5,000 plus interest from September 12, 1960.

Defendant has appealed.

CURRIE, C. J. The issue on this appeal is the constitutionality of the ordinance pursuant to which the $5,000 equalization fee was paid. Defendant asserts that the ordinance is a valid exercise of its police power in controlling subdivision development to assure its burgeoning population adequate parks and schools. Plaintiffs contend that section 8.03 of the ordinance levies a tax which is not authorized by the legislature and unconstitutional.

In 1955 the legislature made extensive revisions in ch. 236, Stats., governing the subdividing and platting of land.[1] Sec. 236.45 was revised so as to permit those localities which are feeling strong pressure of rapid urban growth and development, to legislate more intensively in the field of subdivision control than the legislature has provided for the state at large.[2] In order for a municipality to take advantage of sec. 236.45 it is necessary that it have created a planning agency. Defendant was so qualified inasmuch as it had created a Village Planning Commission in 1958. The pertinent parts of sec. 236.45 read as follows:

> "Local Subdivision regulation. (1) DECLARATION OF LEGISLATIVE INTENT. The purpose of this section is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and

[1] Ch. 570, Laws of 1955.

[2] See Interpretive Commentary with respect to sec. 236.45, 27 W. S. A., p. 534.

other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; *to facilitate adequate provision for* transportation, water, sewerage, *schools, parks, playgrounds,* and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.

"(2) DELEGATION OF POWER. (a) To accomplish the purposes listed in sub. (1), any municipality, town or county which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter. Such ordinances may include provisions regulating divisions of land into parcels larger than 1½ acres or divisions of land into less than 5 parcels, and may prohibit the division of land in areas where such prohibition will carry out the purposes of this section. Such ordinances may make applicable to such divisions any of the provisions of this chapter, *or may provide other* surveying, monumenting, mapping and *approving requirements for such division. . . .*

"(b) *This section and any ordinance adopted pursuant thereto shall be liberally construed in favor of the municipality,* town or county and shall not be deemed a limitation or repeal of any requirement or power granted or appearing in this chapter or elsewhere, relating to the subdivision of lands." (Italics supplied.)

Preliminary to considering the constitutionality of the equalization fee provisions of the ordinance, we deem it advisable to pass on the requirement that the subdivider, where practicable, be required to dedicate a portion of the subdivision for sites for school, park and recreational needs of a value of $200 per residential lot. If this provision of the ordinance is unconstitutional, then of course the provision for payment of a cash fee in lieu of dedicating land for school, park and recreational sites would of necessity also be unconstitutional.

No claim has been asserted in this litigation that the $200 per lot value of land required to be dedicated by the subdivision owner is unreasonable in amount. Nelson, defendant's municipal planning expert, testified that the experience of municipal planners throughout the country has shown that for a good environment for human habitation, for each family in the area, there must be a minimum of 3,000 square feet of land devoted to park and school purposes. After some study of average land values in the village, the village planning commission and the village board determined that land valued at $200 would by and large provide the added park and school lands required for each family brought into the village by creation of the subdivision.

The grounds of the attack upon the land dedication requirement is that it is not authorized by statute and is an unconstitutional taking of private property for public use without just compensation.

Upon careful analysis of sec. 236.45, Stats., we conclude that it does authorize the land dedication requirement of the instant ordinance. Sub. (1) of this statute declares that the purposes of the statute include facilitating "adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements." The common practice of providing for transportation in a subdivision is for municipal platting ordinances to require

dedication of land for streets by the subdivider. Likewise the accepted way to provide water and sewerage facilities for a proposed subdivision is to require the subdivider to provide the same as a condition to the municipality approving the proposed plat. In *Zastrow* v. *Brown Deer*[3] this court stated:

> "The village could require as a condition of its approval of a plat that the subdivider make and install any public improvements reasonably necessary, including a water system, and it could require as a condition for accepting the dedication that the designated facilities previously constructed and provided be without cost to the village, and that such facilities be according to the village's specifications and under its inspection, including water mains and laterals."[4]

Similarly it would seem to follow that the way to facilitate provision for schools, parks, and playgrounds to serve the subdivision would be to require the subdivider to dedicate a portion of the subdivision for such purposes. Sec. 236.13 (2) (a) and (b), Stats.,[5] which apply statewide to all municipalities, irrespective of whether they have planning commissions, grants to municipalities the right to require the subdivider to pay for such public improvements

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[3] (1960), 9 Wis. (2d) 100, 100 N. W. (2d) 359.

[4] *Id.*, p. 108.

[5] These subsections provide: "(a) As a further condition of approval, the governing body of the town or municipality within which the subdivision lies may require that the subdivider make and install any public improvements reasonably necessary or that he execute a surety bond to insure that he will make those improvements within a reasonable time.

"(b) Any city or village may require as a condition for accepting the dedication of public streets, alleys or other ways, . . . that designated facilities shall have been previously provided without cost to the municipality, . . ."

as water and sewer mains, and to dedicate land for public streets, as a condition to the municipality approving the proposed subdivision plat. Sec. 236.45 was intended by the legislature to vest additional authority in those municipalities which had created planning commissions to impose further requirements upon the subdivider. In addition to the aforequoted language spelling out legislative purpose in sub. (1) of this statute, the first sentence of sub. (2) (a), of sec. 236.45, makes clear this intent. The third sentence of this subsection reads, "Such ordinances may make applicable to such divisions any of the provisions of this chapter, or may provide other surveying, monumenting, mapping and approving requirements for such division." Standing alone the statutory words "other . . . approving requirements" would normally be confined to requirements of the same general nature as the antecedent enumerated specific words "surveying, monumenting, mapping." We reject such a restrictive interpretation in favor of the broader one which will encompass the objectives stated in sub. (1). We are further motivated in favor of such a broad interpretation by the direction of sub. (2) (b) requiring a liberal construction of sec. 236.45.

Having concluded that sec. 236.45, Stats., does authorize the land dedication provisions of the instant ordinance, we turn now to the question of whether they constitute an unconstitutional taking of private property for a public purpose. The Illinois supreme court in *Pioneer Tr. & Sav. Bk.* v. *Mt. Prospect*[6] laid down this test of the constitutionality of a requirement placed upon a subdivider, as a condition for approval of the subdivision plat:

> "If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of

[6] (1961), 22 Ill. (2d) 375, 176 N. E. (2d) 799.

private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.'"[7]

We deem this to be an acceptable statement of the yardstick to be applied, provided the words "specifically and uniquely attributable to his activity" are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack. In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider. Possible contravening evidence would be a showing that the municipality prior to the opening up of the subdivisions, acquired sufficient lands for school, park and recreational purposes to provide for future anticipated needs including such influx, or that the normal growth of the municipality would have made necessary the acquisition irrespective of the influx caused by opening up of subdivisions.

There also may be situations, unlike the instant one, where there is no substantial influx from the outside and the proposed subdivision only fulfills a purely local need within the community. In those situations it may be more

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[7] *Id.*, p. 380.

difficult to adduce proof sufficient to sustain a land dedication requirement.

We conclude that a required dedication of land for school, park or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks and playgrounds as a result of approval of the subdivision.

We deem that the evidence in this case does establish such reasonable connection. There is the testimony of planning expert Nelson that for a good environment for human habitation for each family in the area there should be a minimum of 3,000 square feet of land devoted to park and school purposes. Because of its close proximity to Milwaukee, Menomonee Falls has felt the tremendous impact of urban development in recent years. Between July 23, 1959, and March 15, 1963, 41 plats containing 638 lots were approved pursuant to the instant ordinance. There were five dedications of land by the subdividers, four utilized for parks and one for building an addition to a public school. During this period the village also purchased additional park sites. The increase in school population by school years has been as follows:

Year	Increase
1958-59	342
1959-60	512
1960-61	773
1961-62	531
1962-63	685

The village population increased from 6,262 in 1950 to 18,276 in 1960, and to an estimated 25,000 in 1964. Part of the increase in population between 1950 and 1960 was due to the entire town of Menomonee Falls being annexed to the village in 1958.

We do not consider the fact that other residents of the village as well as residents of the subdivision may make use of a public site required to be dedicated by subdivider for school, park or recreational purposes is particularly material to the constitutional issue. This is also true of land required to be dedicated for public street purposes.

The test of reasonableness is always applicable to any attempt to exercise the police power.[8] The basis for upholding a compulsory land dedication requirement in a platting ordinance in the nature of the instant ordinance is this: The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots.

For the reasons stated we determine that the provision of the ordinance requiring *dedication of land when practicable for school, park and recreational sites* is constitutional as a proper exercise of police power.[9]

We turn now to the issue of the constitutionality of the equalization fee provision contained in sec. 8.03 of the ordinance whereby the subdivider is required to pay a total of $200 per lot in lieu of dedicating land of that value for

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[8] *Stierle* v. *Rohmeyer* (1935), 218 Wis. 149, 162, 260 N. W. 647.

[9] *Billings Properties, Inc.* v. *Yellowstone County* (1964), 144 Mont. 25, 394 Pac. (2d) 182; Cutler, Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe, 1961 Wisconsin Law Review, 370, 388, 389; Comment, Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Plat Approval, 1961 Wisconsin Law Review, 310; contra, *Pioneer Tr. & Sav. Bk.* v. *Mt. Prospect* (1961), 22 Ill. (2d) 375, 176 N. E. (2) 799.

school, park or recreational needs where the village planning commission finds dedication of land for such purposes is not feasible. In respect to this provision, the question which poses the greater difficulty is not whether there is an attempted illegal taking which cannot be justified as a reasonable exercise of the police power, but whether the legislature has authorized such a provision.

The reason why we consider that the exercise of police power aspect of the equalization fee question, as distinguished from a requirement that land be dedicated for school, park or recreational purposes, is not troublesome, is because the same reasons which under the facts of this case prompt us to hold that the land dedication requirement constitutes a reasonable exercise of the police power apply with equal force to the equalization fee requirement. The evidence reasonably supports the conclusions that: (1) the approval of the instant and other subdivision plats during the four-year period following the enactment of the ordinance has required defendant village and the encompassing school districts to expend large sums for acquisition of park and school lands and construction of additional school facilities; (2) these expenditures were made necessary by the influx of people into these subdivisions; and (3) these expenditures are greater than the amount which has been exacted from the subdividers by way of land dedication and equalization fees paid in lieu of land dedication. For example, in 1962 a 13 room addition to the Shady Lane School, which is located in the vicinity of plaintiffs' subdivision, was completed at a cost of $28,000 per room or $364,000. During the four-year period following enactment of the ordinance, the total value of all land dedications made and equalization fees collected amounted to only $127,000.

However, even though the equalization fee requirement provision can be sustained as a reasonable exercise of the police power, it is unconstitutional unless authorized by the legislature. The provision possesses sufficient attributes of

a tax so that it cannot be grounded upon the home-rule amendment, sec. 3, art. XI of the Wisconsin constitution. While under this amendment, and the implementing statutes, secs. 61.34 and 62.04, Stats., villages and cities have wide powers to tax for the general welfare, they can only resort to the types of taxes that the legislature has authorized them to use.[10]

Is the equalization fee such a concomitant of the land dedication provision of the ordinance that its authorization can be found in the language of subs. (1) and (2) of sec. 236.45 hereinbefore relied upon to sustain the land dedication requirement of the ordinance? We conclude that it is.

Where a comparatively small tract of land is subdivided, as in the instant situation, and there is no adjoining land already devoted to school, park, or playground purposes to which a portion of the proposed subdivision might be attached, it usually would be impracticable to require dedication of any land of the subdivision. The two alternatives are either to relieve the subdivider from any obligation whatever in this direction, or to require payment of an equalization fee of the nature of that here imposed. The latter is in keeping with the stated purpose of the statute.

While section 8.03 (2) of the ordinance permits use of the proceeds of the equalization fee for capital improvement of schools, parks and recreation areas in addition to site acquisition, nevertheless the making of these capital improvement is encompassed by the words of sub. (1) of sec. 236.45 which declare that the purposes of the statute include facilitating "adequate provision for . . . schools, parks, playgrounds and other public requirements."

The equalization fee exacted pursuant to the ordinance is not a property tax. It is not imposed upon the land in the subdivision as such but is imposed on the transaction of ob-

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[10] See *Plymouth* v. *Elsner* (1965), 28 Wis. (2d) 102, 106-107, 135 N. W. (2d) 799, and cases cited.

taining approval of the plat. Thus, if a tax, it partakes of the nature of an excise tax[11] and does not violate the uniformity clause found in sec. 1, art. VIII of the Wisconsin constitution.

While plaintiffs do not openly contend that the equalization fee is in the nature of a special assessment, they employ arguments that tend in that direction. Thus they point to the fact that the ordinance does not require that park and school sites purchased with funds paid in lieu of dedication bear any relationship to the subdivision providing the funds. This argument would be pertinent if the equalization fee's validity were dependent on justifying it as a special assessment. The argument, however, does have some pertinency on the previously considered issue of unconstitutional taking of private property for a public purpose as opposed to a reasonable exercise of police power.

To conclude, we determine that the imposition of the instant $5,000 equalization fee is not invalid as unconstitutional. In so holding we are cognizant that this result is contra to the conclusions reached by the Illinois and Kansas courts in the well considered cases of *Rosen* v. *Village of Downers Grove*[12] and *Coronado Development Co.* v. *City of McPherson*[13] with respect to the issue of the validity of the attempted exercise of the police power. While we have great respect for these courts, we believe that there is a reasonable basis for upholding the exercise of the police power voiced in the instant ordinance.

By the Court.—Judgment reversed and cause remanded with directions to dismiss the complaint.

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[11] *Barnes* v. *West Allis* (1957), 275 Wis. 31, 37; and cases cited in *Plymouth* v. *Elsner, supra,* footnote 1, p. 105.

[12] (1960), 19 Ill. (2d) 448, 167 N. E. (2d) 230.

[13] (1962), 189 Kan. 174, 368 Pac. (2d) 51.

Dissenting Opinion of Hallows, J.
In Supreme Court of Wisconsin

(Title Omitted)

HALLOWS, J. (dissenting) I must disagree with the interpretation that sec. 236.45, Stats., authorizes the land-dedication requirement found in secs. 8.02 and 8.03 of the village ordinance. I can find no such grant of power in the language "other surveying, monumenting, mapping and approving requirements for such division." A liberal construction required by sec. 236.45(2)(b) does not justify the disregarding of a fundamental rule of construction. The conferring of such an important power as a police power whose exercise curtails the rights of individuals should be expressed in nothing less than clear and concise language. Consequently, the power to require land to be given for school and park purposes as a condition of the approval by a municipality of a plat of a subdivision should be granted in more definite language than the terms "approving requirements" and "to facilitate adequate provision for . . . schools, parks, playgrounds." Specific language authorizing the requirements for dedication of land for school and park purposes could have been used as it has been used in reference to roads, waters and sewers in sec. 236.13(2)(a) and (b).

Assuming sec. 236.45, Stats., authorizes the land-dedication provisions of the village ordinance, the provisions especially the requirement of the payment of $200 in lieu of land dedication constitute an unconstitutional taking of private property for public purposes. The majority opinion reasons these provisions may be justified on the ground a subdivider receives some benefit by the approval of the plat and in return the municipality may require him to dedicate part of his land to meet a demand of the municipality because of the influx of people to the community who occupied the subdivided lots. That may be a justification if there is a reasonable relationship between the amount of

land taken and the need of the proposed plat for parks and schools. The majority opinion seems to indicate prior need for public land caused by other subdividers who have not so contributed justify the exaction of land from a subsequent subdivider.

By analogy, any dedication of land for parks and school purposes or money in lieu thereof should be governed by the same rules which apply to public roads and sewer and water in the subdivision. When land is dedicated for public streets or for the furnishing of water mains and sewers, their location insures some definite benefit to the rest of the land in the plat. While these are of special benefit to the lots, they are, of course, incidentally of benefit to the community at large.

In respect to the alternative provision for the payment of money in lieu of land for school and park purposes, I find no authority for the municipality to enact such an alternative and no restriction or requirement that the money be used for parks and schools in the vicinity of the subdivision. The money may be used anywhere in the municipality and is not restricted for the direct benefit of the subdivision. Consequently, this requirement of the payment of a fee which a municipality has the option to demand in lieu of land is nothing more than a revenue-raising device for the general welfare of the municipality and as such is in the nature of a tax and cannot be justified as an exercise of the police power. *Milwaukee* v. *Milwaukee and S. T. Corp.* (1959), 6 Wis. (2d) 299, 94 N.W. (2d) 584; 51 Am. Jur., Taxation, p. 35, sec. 3, and p. 46, sec. 12. I think the trial court was correct in finding the requirement to be in the nature of a tax and the village had no power and was not authorized by the legislature to impose it. *Whitney* v. *Dept. of Taxation* (1962), 16 Wis. (2d) 274, 114 N.W. (2d) 445. There is no implementing authorization conferring the power to impose such a tax nor does the Home-Rule Amendment (sec. 3, Art. XI, Wis. Const.) authorize it since

a tax is not a local matter. *City of Plymouth* v. *Elsner* (1965), 28 Wis. (2d) 102, 135 N.W. (2d) 799. Being in the nature of a tax it makes no difference whether the tax is a property tax bound by the uniformity requirement or an excise tax not so restricted.

It is quite apparent the so-called equalizing fee bears no reasonable relationship to the subdivision since it is not restricted to its benefit. The placing of such payments in the general treasury of the municipality cannot be justified on the theory that parks and schools will eventually be built or have been built in the subdivision area out of the general fund. Such a view ignores the vital distinction between the taxing power and the police power.

The unconstitutionality of the provisions requiring subdividers to pay such fees has been held in *Coronado Development Co.* v. *City of McPherson* (1962), 189 Kan. 174, 368 Pac. (2d) 51; *Haugen* v. *Gleason* (1961), 226 Ore. 99, 359 Pac. (2d) 108; *Rosen* v. *Village of Downers Grove* (1960), 19 Ill. (2d) 448, 167 N.E. (2d) 230. Under slightly more narrow enabling statutes the requirement of payment of fees for approval of subdivision plats was found unauthorized in *Kelber* v. *City of Upland* (1957), 155 Cal. App. (2d) 631, 318 Pac. (2d) 561, and *Santa Clara County Con. & Home* v. *City of Santa Clara* (1965), ... Cal. App. ..., 43 Cal. Rept. 86. A town ordinance which requires the dedication of land or payment in lieu thereof for a neighborhood-park playground for recreational purposes was held unconstitutional so far as it provided for the payment of money in lieu of a dedication because the payment exacted could be spent on any recreational area in the city and not necessarily for the benefit of the subdivision. *Gulest Associates, Inc.* v. *Town of Newburgh* (1960), 25 Misc. (2d) 1004, 209 N.Y. Sup. (2d) 729; see also *Jenad, Inc.* v. *Village of Scarsdale* (1965), 23 A.D. (2d) 784, 258 N.Y. Sup. (2d) 777, which held a village code was unconstitutional in so far as it provided for payment in lieu of dedication of land

where the statute authorizing a land requirement was silent as to the alternative payment.

I would affirm.

Judgment of Supreme Court of Wisconsin

(Title Omitted)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Waukesha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Waukesha County, in this cause, be, and the same is hereby, reversed and the cause remanded with directions to dismiss the complaint with costs of the Village of Menomonee Falls against the said respondent taxed at the sum of Five Hundred and Thirty-Eight Dollars and Twenty Cents ($538.20).

Justice Hallows dissents.

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